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Testimony HB 694
February 20, 2007

Open records and the ability to quickly and inexpensively search through electronic public documents has become an important issue with our rapidly changing modern age.

Electronic records being archived and searchable is important for the public and government research.

Some estimates indicate that up to 90% of records are now generated and received electronically, primarily through email.

If a local government unit is unable to search through its electronically generated and received documents for those that have been requested in an open records request under Montana's open records statutes, that agency has *de facto* removed a significant part of the public documents in its care from public scrutiny which can create a litigious situation.

Additionally, if a local government agency is only able to provide copies of electronically archived documents after an expensive and time-consuming search process that is out of the financial reach of most citizens who'd want a copy of a public document, than that agency has effectively screened-out a number of its public documents from public scrutiny.

Most proponents of open government view this situation as unsatisfactory.

In addition to the fact that open records laws become *de facto* meaningless if government agencies are unable to inexpensively and quickly search through electronic documents, the new Federal Rules of Civil Procedure adopted on December 1, 2006 institute far-reaching changes for the handling of email as evidence in all federal cases.

These new Federal Rules of Civil Procedure apply to every business, organization, and person who may ever be involved in a federal court case. This obviously includes school districts, city governments, county government and state agencies.

The FRCP creates an extremely broad description of what "electronically stored information" must be disclosed, places a time limit for the disclosure, and stipulates a "good-faith" test on retention schedules. Organizations are expected to know:

- What email is stored anywhere in the organization.
- How to produce email and how much effort it would take to produce it.

- When and how email may be deleted.

Electronic records retention and archival specialists are recommending that businesses install systems that are able to rapidly retrieve any internal or external email without changing the original message. The system should index every email message, and identify all senders and recipients. The original message should never be changed.

The new FRCP ruling affirms that email messages and other electronic documents are part-and-parcel of the documents that organizations must retain. It clarifies that electronic communications should be preserved with the same care and diligence as paper documents.

Helping local governments avoid costly litigation

Montana can help local governmental entities avoid costly litigation and embarrassment, if they are unable to quickly, inexpensively and comprehensively provide requested documents by promulgating “best practices” for electronic records retention, search abilities, and archiving procedures.

These “best practices” should make it possible for a governmental entity to search through its archived emails for keywords in open records requests. If citizens are unable to inexpensively obtain copies of electronic public documents because local units of government have unwieldy or antiquated electronic search capacities, this means that many public records have been inappropriately been placed outside the reach of Montana open records law.

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The open records law in Montana: history and current status

Montana provides for public access to records both through statute (Mont. Code. Ann. Secs. 2-6-101 to 2-6-111; 2-6-201 to 2-6-405) and in its Constitution, which provides in Article II, Section 9 (2001) that:

"no person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies ... except in cases in which the demand for individual privacy clearly exceeds the merits of public disclosure."

While many other states first passed laws guaranteeing the right of the public to inspect and obtain copies of public documents in the wake of Watergate in the 1970s, Montana has the distinction of having passed its first open records law in 1895, six years after statehood.

Attorney Peter Michael Meloy, of Meloy & Morrison in Helena, in preparing an introduction to Montana's open records laws for the Open Government Guide published by the Reporters Committee for Freedom of the Press, wrote:

"As might be expected, however, these constitutional and legislative efforts have not lessened the tendency of governmental bodies toward secrecy. Montana officials, not unlike officials in other states, believe the public's business can most efficiently be carried on in secret. Thanks to a vigilant press and active public interest groups willing to litigate, Montana government has not been covert with impunity."

How Montana's laws are viewed by groups that provide national rankings

In the last several years, two national organizations have provided state-by-state comparison rankings of open records legislation.

Montana has not fared well in these state rankings.

For example, the Better Government Association¹, with the assistance of Investigative Reporters and Editors, Inc.², conducted a state-by-state survey in 2002

¹ See the Better Government Association's website at <http://www.bettergov.org/>. BGA is a non-profit, non-partisan group that was founded in 1923.

² The Investigative Reporters and Editors website is <http://www.ire.org/>. IRE is a grassroots nonprofit organization dedicated to improving the quality of investigative reporting. It was formed in 1975.

about the comparative ability of citizens in different states to obtain copies of public documents. This report is known as the BGA Integrity Index.³

On this report, Montana ranks 44 out of 50, with an overall grade of “F”. Out of 16 possible “openness” points, Montana earned 1.5 points.

The five areas the Better Government Association considered in reaching its conclusions about state laws were (a) the amount of time a public agency is given to respond to a request, (b) the appeal process available to citizens when requests are denied, (c) whether appeals are expedited, (d) whether citizens who take denials to court are awarded attorney’s fees if they prevail and (e) whether any punishments-civil or criminal—are given to public officials who illegally deny requests for records.

The Marion Brechner Citizen Access Project⁴ is part of the University of Florida. The Citizen Access Project provides an online database of open records legislation in all 50 states, allowing readers to compare provisions from state-to-state.

The Citizen Access Project provides a “Sunshine Index” that ranks different parts of the law. Each part of the open records law of each state is given a numerical ranking between 1 and 7, where 1 = “completely closed” and 7 = “completely open”.

The Citizen Access Project ranks Montana’s laws as either a 1, 2 (“nearly dark”) or 3 (“somewhat closed”) in 24 of the 39 areas considered. One particular area of concern is that “No law directly indicates that agencies have a responsibility to maintain separate indices for public records stored on computers.”

³ See http://www.bettergov.org/pdfs/policy_integrityindex_2002.pdf. This report was funded in part by the Ford Motor Company Center for Global Citizenship. See pages 7-12 for the section pertaining to open records legislation.

⁴ <http://www.citizenaccess.org>. “The goal of the C in all 50 states.”

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